90-381

No. _____

In The

Supreme Court of the United States

October Term, 1990

DEERE & COMPANY,

Petitioner,

vs.

T. J. KENNEDY, D.C.; TERRY L. BURKE, d/b/a BURKE CHIROPRACTIC CLINIC; MICHAEL H. W. HURST, d/b/a HURST CHIROPRACTIC CLINIC; STEPHEN MINER, D.C., d/b/a MINER CHIROPRACTIC CLINIC; and JAMES P. WOODS, D.C.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a state court lacks authority to choose its own interpretation of a collectively bargained ERISA Plan when the parties, both the company and the union, have agreed upon a different meaning.

2. Whether *de novo* review of the Plan Administrator's interpretation of a collectively bargained ERISA plan is appropriate under *Firestone Tire and Rubber Company v. Bruch*, 489 U.S. ___, 109 S.Ct. 948, where the parties to the agreement concurred in that interpretation, even though, in the event there *had* been a disagreement between the parties, the Appeal Board's construction would have been entitled to substantial deference.

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were petitioner Deere & Company and the respondents, T. J. Kennedy, D.C.; Terry L. Burke d/b/a Burke Chiropractic Clinic; Michael H. W. Hurst d/b/a Hurst Chiropractic Center; Stephen Miner, D.C. d/b/a Miner Chiropractic Clinic; and James P. Woods, D.C. In the trial court the suit of Harlow E. Wells, D.C. had been consolidated with the suits of the other respondents named above, but he voluntarily dismissed his suit against the petitioner on November 16, 1984.

The petitioner Deere & Company is a publicly held company which has no parent company or affiliates. Its subsidiaries (other than wholly owned subsidiaries) are:

U.S. SUBSIDIARIES:

Amerequip Corporation

Argo Systems

FOREIGN SUBSIDIARIES:

John Deere S.A. de C.V. (Mexico)

Yanmar-John Deere Engineering Yugen Kaisha (Japan)

FANATRACTO (Fabrica Nacional de Tractors y Motores S.A. (Venezuela)

SLC S.A. Industria e Comercio (Brazil)

John Deere Lanz Verwaltungs A.G. (Germany)

ADELA Investment Company S.A. (Luxembourg)

LAAD S.A. (Panama)

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT

Petitioner Deere & Company respectfully prays that a writ of certiorari issue to the Illinois Appellate Court to review its judgment and opinion entered on December 8, 1989, which the Illinois Supreme Court, on June 1, 1990, refused to review by denying a Petition for Leave to Appeal filed by Deere & Company.

OPINIONS BELOW

The Order of the Illinois Supreme Court appears at p. 10 of the Appendix ("App.").

The opinion of the Illinois Appellate Court, Third District, is eported at 192 Ill.App.3d 18, 548 N.E.2d 610, and appears at App. 1.[1]

The opinion and order of the trial court granting partial summary judgment in favor of Deere & Company appears at App. 11.

JURISDICTION

In their amended complaints, the respondents, who are chiropractors, assert causes of action under ERISA on the basis that the assignments they obtained from the plan participants qualify them as beneficiaries as defined in Sec. 3(8) of ERISA (29 U.S.C. § 1002(8)). They are thus proceeding under Sec. 502(a)(1) (29 U.S.C. § 1132(a)(1)) for benefits allegedly due under a health benefit plan. State courts have concurrent jurisdiction with the district courts of the United States concerning such actions. 29 U.S.C. § 1132(e)(1).

On March 16, 1989, the trial court granted partial summary judgment in favor of Deere & Company on the basis that claims for what the respondents term "outpatient physical therapy" were not covered under the terms of the benefit plan which was the product of collective bargaining between Deere & Company (Deere) and the

[1] As a published opinion the case has precedential effect.

International Union, United Automobile, Aerospace and Agricultural Workers of America (UAW).

The respondents appealed and on December 8, 1989, the Illinois Appellate Court, Third District, issued an opinion reversing the trial court. On June 1, 1990, the Illinois Supreme Court denied the Petition for Leave to Appeal filed by Deere.

The jurisdiction of this Court to review the judgment of the Illinois Appellate Court is invoked under 28 U.S.C. § 1257(3). Although there may be limited additional proceedings in the trial court, the federal issue has been finally determined and this Court thus has jurisdiction under the standards set forth in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). See also *Radio Station WOW v. Johnson*, 326 U.S. 120, 124-27 (1945); *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 278, n.7 (1980).[2]

STATUTES INVOLVED

Sec. 502(a)(1)(B) of ERISA [29 U.S.C. sec. 1132(a)(1)(B)]:

A civil action may be brought –

(1) by a participant or beneficiary . . .

---

[2] The Appellate Court remanded for a respondent-by-respondent, claim-by-claim determination of whether the physical therapy at issue was provided in "comprehensive physical therapy facilities." The federal issue will survive this determination at least as to some of these claims. Accordingly, the judgment below falls within the first two categories discussed in *Cox*, 440 U.S. at 478-80.

> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan. . . .

STATEMENT OF THE CASE

On October 1, 1975, Deere and the UAW, as the result of the collective bargaining process, added certain outpatient physical therapy coverage to the John Deere Health Benefit Plan for Hourly and Incentive Paid Employees (the Plan). Deere also simultaneously afforded the same benefits to its Salaried Employees via The Health Benefit Plan for Salaried Employees (also referred to herein as the Plan). The two benefit plans, for all purposes pertinent to this litigation, have been interpreted and administered consistently. (R.C817-818).

The Plan, which provides specified health and accident benefits to present and retired employees and their dependents, is an employee benefit plan as defined by the Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C. § 1001 *et seq.*). Deere at all times has been the Administrator of the Plan. (R.C812, 829).

The Plan Administrator has the right to interpret language of the Plan; the parties to the collectively bargained agreement created a jointly selected Appeal Board to resolve disputes over such interpretation. Appeal Board Membership consists of three persons selected by Deere, three persons selected by *UAW* and, if necessary, the permanent arbitrator designated under the labor

agreement. Article VII of the Plan, which establishes the Appeal Board, provides in Section 2:

> A. Any dispute concerning the interpretation of the language in the aforementioned Health Benefit Plan . . . may be referred . . . to an Appeal Board.
>
> E. . . . All decisions of any Appeal Board concerning interpretation of the language of any provision of the Health Benefit Plan . . . shall thereafter govern the interpretation of the language of the Health Benefit Plan . . . .

Plan, pp. 23-25 (R.C861, 862). See App. 26, 27.

One of the claims of the respondent chiropractors is that, as assignees of the participants, they are entitled to payment of benefits for outpatient physical therapy.[3] The portion of the Plan pertaining to coverage for outpatient physical therapy is Article XVI, Section 1, Appendix "B," which provides:

> Outpatient physical therapy benefits will be payable for services performed for a period of 60 treatment days when prescribed by a physician for a specified condition resulting from disease or injury or prescribed immediately following surgery related to the condition and

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[3] The Complaints indicate that to the date the respective suits were filed in 1983 and 1984 the amounts being sought were as follows: Drs. Kennedy, $80,831.00; Burke, $492,001.40; Hurst, $107,722.75; Wells, $52,064.50 (subsequently voluntarily dismissed); Miner, $183,253.00 and Woods, $27,479.80. R. (83 L 230) C2-4; R. (83 L 231) C1-3; R. (83 L 273) C1-3; R. (84 L 191) C1; R. (84 L 192); R. (84 L 193) C1. These cases were consolidated. The additional amount of such claims accruing since 1983/1984 has not been revealed.

> when the physical therapy is performed in a nursing home or other facilities such as rehabilitation centers having comprehensive physical therapy facilities. Such services must be performed by a physician or a qualified physical therapist according to prescription from a physician concerning the nature, frequency and duration of the treatment.

(R.C733). See App. 25.

The alleged physical therapy in question was provided by the respondents to their patients in respondents' own chiropractic offices. No second licensed health care provider, either physician or physical therapist, was involved.

In its major factory areas, including the Quad-City Area in Illinois and Iowa, Deere has consistently interpreted the Plan to require the involvement of two licensed health care professionals. One provider must prescribe the physical therapy; another must render the physical therapy services in a separate physical therapy facility. Accordingly, claims for physical therapy administered in their own offices by chiropractors or by medical doctors, were *never* approved for payment (R.C854, 860), either before or after respondents asserted their first claim in 1980. (R.C295). Neither Deere nor the UAW has ever considered such treatment to be a covered benefit under the Plan.[4]

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[4] By requiring the involvement of two licensed professionals, there is an increased likelihood that the physical therapy is necessary and appropriate. This provides protection against overutilization and benefits both parties to the contract.

On March 5, 1985, Deere and the UAW confirmed in writing their understanding that outpatient physical therapy administered in the office of the treating physician (medical doctor, chiropractor or osteopath) was not covered. (R.C808). The letter states:

> The subject of outpatient physical therapy benefits (Appendix "B", Article XVI) has been discussed previously and again in recent discussions between the parties.
>
> The parties agreed that the phrase "other facilities such as rehabilitation centers having comprehensive physical therapy facilities" (Appendix "B", Article XVI, Section a-A) has always meant and will continue to mean those facilities that have already been approved by the Company and does not include the offices of medical doctors, chiropractors, osteopathic physicians or the offices of other similar providers. A list of current approved facilities in our major manufacturing areas is attached for your records.
>
> In the future, if additional facilities are approved by the Company, the Union will be so notified and will have the right to disapprove such facility(ies) as a provider of benefits under Appendix "B", Article XVI.

See App. 29.

Subsequently, the parties' collective bargaining agreements specifically incorporated this understanding. (R.C804, 809, 810).

Because the respondents were treating only their own patients, none of their offices has ever been approved by the Plan Administrator as "rehabilitation centers having comprehensive physical therapy facilities." (R.C823). Such approval would be inconsistent with the intent of the parties to the contract.

Deere's denial of respondents' claims led to this litigation. Earlier, the Illinois Supreme Court held that the respondents, as their patients' assignees, had standing to assert claims under § 532(a)(1)(B) of ERISA (29 U.S.C. § 1132(a)(1)(B)). *Kennedy v. Deere & Company*, 118 Ill.2d 69, 514 N.E.2d 171, 174 (1987), cert. denied, 484 U.S. 1064. The issue now is whether respondents' claims arise out of a covered benefit under the Plan.

The respondents moved for Summary Judgment asserting they were entitled to payment as a matter of law. Deere responded with a Motion for Partial Summary Judgment, which argued that its denial of the claims should be sustained. The trial court denied respondents' motion and allowed the motion filed by Deere. Certain unrelated claims by respondents are still pending[5]; the trial court thus made the ruling final and appealable under Illinois procedure by finding pursuant to Supreme Court Rule 304(a), that there was no reason to delay enforcement or appeal. The Illinois Appellate Court for the Third District reversed, and the Illinois Supreme Court denied Deere's timely Petition for Leave to Appeal.

Federal concerns have, of course, been present throughout this ERISA case. Specifically, Deere raised the issue of the standard of review in an ERISA case, and of the controlling effect of the parties' agreement as to the Plan's meaning, when the Motions for Summary Judgment were briefed in the trial court. This issue was briefed and argued extensively in the Appellate Court,

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[5] The remaining claims relate to the reasonableness of respondents' charges for various services. These claims will be unaffected by the resolution of the questions presented herein.

where Deere also raised the federal doctrine concerning the Court's lack of authority to interfere with a collectively bargained agreement. After the Appellate Court rejected these arguments by applying the *de novo* standard and imposing its own construction, Deere renewed its federal claims in its unsuccessful Petition for Leave to Appeal to the Illinois Supreme Court.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Illinois Appellate Court is contrary to federal law, as expressed in the Labor Management Relations Act, and threatens the stability of the collective-bargaining process.

The ability of a company and a union to fix the terms of employment via collective bargaining is vital to the economic system upon which our country is based. Accordingly, this Court and many lower federal tribunals have made it clear that where the parties to a collective bargaining contract agree on a matter, the courts lack jurisdiction or authority to impose a different agreement. *United Mine Workers Health & Retirement Funds v. Robinson*, 455 U.S. 562 (1982). Federal law preempts state law from affecting the substantive terms of a collectively bargained agreement. *Lodge 76 Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976); *White Motor Corp. v. Malone*, 545 F.2d 599 (8th Cir. 1976); see also, reference to "free zone of bargaining." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. ___, 110 S.Ct. 444, 453 (1989) (dissenting opinion).

In this case the state appellate court ignored those principles. Faced with a contractual provision which both Deere and the UAW agreed does not cover the "outpatient physical therapy" which the respondent chiropractors provided, the court decided to impose its own contrary interpretation on the parties.

In fact, on March 5, 1985, Deere and the UAW confirmed in writing that they had never intended physical therapy administered by a physician in his own office to be a covered benefit under the Plan. This letter agreement was subsequently incorporated in the next two collective bargaining agreements of the parties. (R.C804, 809, 810).

Federal common law, which fills the gaps left by ERISA's express provisions, clearly permits the parties to a collective bargaining agreement to determine whether certain benefits will or will not be afforded to the workers and other participants. *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344 (8th Cir. 1980); *In re White Farm Equipment Co.*, 788 F.2d 1186 (6th Cir. 1986). Thus Deere and the UAW had the right, which they exercised, to determine whether given treatment qualifies for coverage under the Plan.

It is undisputed that outpatient physical therapy must be performed in a nursing home or rehabilitation center having comprehensive physical therapy facilities in order to qualify as a covered benefit under the Plan. As the Appellate Court recognized, Deere and the UAW acknowledged in their March 5, 1985, agreement that the phrase, "rehabilitation centers having comprehensive physical therapy facilities" means – and "has always meant and will continue to mean" – "those facilities that

have already been approved by the Company and does not include the offices of medical doctors, chiropractors, osteopathic physicians or the offices of other similar providers." *Kennedy v. Deere & Company*, 548 N.E.2d at 613; App. 1. The treatment in question was indisputably all rendered by the respondents as their patients' treating physicians and entirely in their own offices.

However, the Illinois Appellate Court glossed over the parties' understanding and intent by stating that Deere's refusal to approve the office of any treating physician was based upon what the Court felt was an incorrect interpretation of the Plan. The court stated:

> Because we hold that a proper interpretation of the language of the Health Benefit Plan provision in issue does not require that covered physical therapy treatments be restricted to those performed by physicians or therapists other than the prescribing physician, we find that the March 5, 1985 agreement is ineffective to preclude payment of plaintiffs' claims.

Ibid.

The Appellate Court's approach would wreak havoc with the labor law of this nation, as set forth by Congress in the Labor Management Relations Act. Throughout the country, collective bargaining defines the relationship between a company and its workers. From time to time these parties clarify, or amend, their agreement to deal with changing circumstances. This is a vitally important function for both sides and for the way that American business is conducted. If courts can, like the court below, refuse to enforce a mutually agreed upon provision

because it deviates from what that court thinks the collectively bargained agreement means, the stability of labor-management relationships will be threatened.

A collectively bargained contract is no ordinary agreement. It has been termed a "whole system of industrial self-government" and "the common law of a particular industry or shop." This Court has explained the concept as follows:

> The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. See Shulman, Reason, Contract, and Law in Labor Relations, 68 Harv. L. Rev. 999, 1004-1005. The collective agreement covers the whole employment relationship. It calls into being a new common law – the common law of a particular industry or of a particular plant. . . .
>
> A collective bargaining agreement is an effort to erect a system of industrial self-government. . . . Because of the compulsion to reach agreement and the breadth of the matters covered, as well as the need for a fairly concise and readable instrument, the product of negotiations (the written document) is, in the words of the late Dean Shulman, "a compilation of diverse provisions; some provide objective criteria almost automatically applicable; some provide more or less specific standards which require reason and judgment in their application; and some do little more than leave problems to future consideration with an expression of hope and good faith." Shulman, supra, at 1005. Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement.

United Steelworkers of America v. Warrior and Gulf Navigation Company, 363 U.S. 574, 578-580 (1960) (footnotes omitted)

Accordingly, this Court has also held that courts have "no business" overruling an arbitrator's construction of a collectively bargained contract. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960). It is even more obvious then that courts are without authority to impose their construction on a contract when, as in this case, the parties agreed on its meaning without even having to resort to an arbitrator.

The decision here raises important questions about the operation of federal and state law in interpreting a collectively bargained agreement. It is well established that state courts must apply federal law when deciding controversies arising under collective-bargaining agreements. *United Steelworkers of America, AFL-CIO-CIC v. Rawson*, ___ U.S. ___, 110 S.Ct. 1904 (1990); *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962).

This case merits review in order to preserve the important doctrines of federal preemption and lack of authority to vary the terms of a collectively bargained agreement.

II.

This case affords the Court an opportunity to clarify its holding in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. ___, 109 S.Ct. 948 (1989).

In *Firestone Tire and Rubber Company v. Bruch*, 489 U.S. ___, 109 S.Ct. 948 (1989), the Court held that decisions of

plan administrators or fiduciaries were to be reviewed on a *de novo* basis unless the plan conferred discretion. The deferential standard (arbitrary and capricious) applies in the latter situation. In the 18 months since, the courts have struggled in at least 25 cases to interpret and apply the *Firestone* rule to a variety of situations.[6]

The court below committed two critical errors in its understanding of *Firestone*. First, it ignored the fact that nothing in *Firestone* suggests that *de novo* review is required where the Plan administrator acts not unilaterally, but with the concurrence of the other party to the collective bargaining agreement. *Firestone* simply did not involve a collectively bargained provision much less one whose meaning had been defined by joint action of the parties. The denial of benefits at issue in *Firestone* was based upon the plan administrator/employer's unilateral construction of the Plan. Where both parties to a contract agree on its meaning, the principles addressed under Point I, rather than the principles of trust law that provided the basis for the Court's holding that *de novo* review was appropriate in *Firestone*, are controlling. The Court should grant certiorari to clarify that *Firestone's* analysis of whether *de novo* or deferential review is appropriate was not intended to govern the kind of bilateral interpretation at issue here.

Second, even if the lower court was correct in looking to *Firestone* in determining the standard of review, it erred in holding that *de novo* review was appropriate. This

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[6] Determined by review of the 99 cases which have cited *Firestone* located via Westlaw Later Case Service Search conducted on August 9, 1990.

Court held, in *Firestone*, that a deferential (arbitrary and capricious) standard of review is appropriate if the benefit plan "gives the *administrator or fiduciary* discretionary authority to determine eligibility for benefits or to construe the terms of the plan" (emphasis added). 489 U.S. at ___, 109 S.Ct. at 956. In this case, the Plan Administrator, the Appeal Board and the permanent arbitrator, separately and collectively, are a "fiduciary" as ERISA defines that term. The statutory definition of a fiduciary is one who "exercises any discretionary authority or discretionary control respecting management of (a) plan or exercises any authority or control respecting management or disposition of its assets." 29 U.S.C. § 1002(21)(A)(i).

The Appellate Court acknowledged that authority to interpret the Plan may be vested in the Appeal Board and that decisions of that board "would be subject to an administrative (deferential) standard of review." 548 N.E.2d at 610 (App. 1). But the state court felt that discretion must be vested in the Plan Administrator, not a review body created by the plan, for the Administrator's interpretation to receive deference in the absence of review. The Court should grant certiorari to make it clear that the deferential standard of review applies where the plan provides for participation in the interpretative process by someone other than the Plan Administrator.

The decision below is contrary to such federal decisions as *Boyd v. Trustees of United Mine Workers Health & Retirement Fund*, 873 F.2d 57 (4th Cir. 1989). In *Boyd*, a Field Service Office made the initial determination just as the Plan Administrator does under the Plan in question. The United Mine Workers plan did not give the Field Service Office discretionary authority, but did provide

such authority for the trustees of the plan. The trustees affirmed the Field Service Office's decision to deny the claim. Suit was filed, the trial court applied a deferential standard of review, and the Court of Appeals affirmed the use of this standard. It noted that, under *Firestone*, "where the administrator or fiduciary has discretionary authority, an abuse of discretion standard should apply."

The only difference between *Boyd* and the present case is that, in the former, there was an appeal to the trustees whereas here, because the UAW concurred in the Plan Administrator's interpretation, no appeal occurred. That distinction should not compel a different result. Deferential review should apply where a body such as the plan trustees or, as in the present case, an Appeal Board has the right to interpret an ERISA plan. The contrary decision below makes little sense; why should Deere's interpretation, which never received Appeal Board review in light of the UAW's concurrence, receive less deference than would a disputed interpretation resolved by the Appeal Board? Under every established principle of contract interpretation applicable to collective bargaining contracts and ERISA plans, an agreed-upon interpretation should not receive less deference than a disputed construction made or resolved by a discretion-wielding entity.

CONCLUSION

Without further review, this case threatens the stability of important federal principles and creates uncertainty and conflict with respect to the application and scope of the *Firestone* doctrine. For these reasons, Deere & Company prays that this petition be granted.

Respectfully submitted,

DEERE & COMPANY, Petitioner,

By /s/ Robert J. Noe
One of Its Attorneys.

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STATE OF ILLINOIS
[SEAL]
APPELLATE COURT THIRD DISTRICT
OTTAWA

3-89-0169

Kennedy v. Deere & Co.

At a term of the Appellate Court, begun and held at Ottawa, on the 1st Day of January in the year of our Lord one thousand nine hundred and eighty-nine, within and for the Third District of Illinois:

Present –

HONORABLE WILLIAM B. WOMBACHER, Presiding Justice	X
HONORABLE JAMES D. HEIPLE, Justice	X
HONORABLE ALBERT SCOTT, Justice	
HONORABLE TOBIAS BARRY, Justice	X
HONORABLE ALLAN L. STOUDER, Justice	
ROGER H. JOHNSON, Clerk	

BE IT REMEMBERED, that afterwards on December 8, 1989 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following viz:

No. 3-89-0169

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
A.D., 1989

T. J. KENNEDY, D.C.; TERRY L. BURKE d/b/a BURKE CHIROPRACTIC CLINIC; MICHAEL H. W. HURST d/b/a HURST CHIROPRACTIC CLINIC; STEPHEN MINER, D.C. d/b/a MINER CHIROPRACTIC CLINIC; and JAMES P. WOODS, D.C., Plaintiffs-Appellants, vs. DEERE & COMPANY, Defendant-Appellee	))))))))))))	Appeal from the Circuit Court of Rock Island County No. 83 L 230 Honorable JOHN DONALD O'SHEA, Judge, Presiding.

JUSTICE BARRY delivered the opinion of the court
Publ. In Full

This action was initiated in 1983 and is before us on its second tour of appellate review. Plaintiff chiropractors sued defendant Deere & Co. to recover health insurance benefits assigned to them by their patients, employees of the defendant manufacturer. Defendant is the Plan Administrator of its employees' Health Benefit Plan, which Plan is subject to the Federal Employee Retirement Income and Security Act (ERISA) (29 U.S.C. 1001 *et seq.*) In the first appeal we held that plaintiffs, as assignees of their patients, had standing to claim benefits pursuant to sections 1132(a)(1)(B) and 1132(e)(1) of the Act. (142

Ill.App.3d 781, 492 N.E.2d 119.) That decision was affirmed by the supreme court (118 Ill.2d 69, 514 N.E.2d 171), and the parties thereafter resumed pre-trial litigation in the circuit court.

Plaintiffs filed a fourth amended complaint in three counts. The court granted defendant's motion to dismiss counts I and III, sounding in discrimination, on December 30, 1988. Both parties then moved for summary judgment on Count II, in which plaintiffs claimed breach of contract. The circuit court ultimately denied plaintiffs' motion and allowed partial summary judgment in favor of defendant on March 16, 1989. The circuit court ruled that plaintiffs' claims for outpatient physical therapy benefits were properly denied by Deere because Deere, *qua* Plan Administrator, had not arbitrarily or capriciously construed the relevant terms of the health benefit Plan to deny coverage for physical therapy performed by chiropractors in their offices. Plaintiffs perfected this interlocutory appeal from that order.

Plaintiffs contend in this appeal that the circuit court applied the wrong standard in reviewing the Plan Administrator's decision; and that if the correct standard is applied plaintiffs' claims would be covered by defendant's Health Benefit Plan. Defendant contends that its Health Benefit Plan has been consistently interpreted by the Plan Administrator to exclude coverage for physical therapy administered by the patient's treating physician in his own office; and that Deere and the United Auto Workers' Union confirmed this understanding in writing on March 5, 1985 and incorporated a letter to this effect in their collective bargaining agreement. Defendant posits

that the circuit court's determination must be sustained under any appropriate standard of review.

The relevant section of defendant's Health Benefit Plan provides as follows:

> "Outpatient physical therapy benefits will be payable for services performed for a period of 60 treatment days when prescribed by a physician for a specified condition resulting from disease or injury or prescribed immediately following surgery related to the condition and when the physical therapy is performed in a nursing home or other facilities such as rehabilitation centers having comprehensive physical therapy facilities. Such services must be performed by a physician or a qualified physical therapist according to prescription from a physician concerning the nature, frequency and duration of treatment."

Defendant has taken the position that this section requires two licensed health care providers – one physician to write a prescription, and a second physician or physical therapist to administer the treatment. Accordingly, treating physicians' offices, including offices of osteopaths and chiropractors have never been approved by Deere as "other facilities . . . having comprehensive physical therapy facilities."

Plaintiffs contend that as chiropractors they are "physicians" by virtue of section 4400-2(10) of the Medical Practice Act of 1987 (Ill.Rev.Stat. 1987, ch. 110, par 4400-2(10)). They are qualified to both prescribe and perform physical therapy using equipment on the premises of their offices. By requiring them to refer their patients to outside therapists, they argue, Deere rewrites the Health Benefit Plan.

Obviously, before considering the Plan's language, we must determine the appropriate standard of review. That question was resolved by a decision handed down by the Supreme Court of the United States on February 21, 1989. (*Firestone Tire and Rubber Co. v. Bruch* (1989), ___ U.S. ___, 109 S.Ct. 948, ___ L.Ed2d ___.) Although neither the parties nor the circuit court had the benefit of the Supreme Court's decision when the parties' arguments on their motions for summary judgment were heard in March, 1989, both parties acknowledge that the opinion must be considered in this appeal.

In *Firestone*, the Court stated:

> "Consistent with established principles of trust law, we hold that a denial of benefit challenged under § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." 109 S.Ct. at 956.

The Plan in the case *sub judice* provides that

> "[a]n Appeal Board shall be established for the purpose of resolving disputes concerning the interpretation of the provisions of the Health Benefit Plan. * * * It is . . . , the intent of this procedure to establish a means of determining questions or disagreements and to resolve disputes over the proper interpretation of the provisions of the Health Benefit Plan. * * * Any dispute concerning the interpretation of the language in the . . . Health Benefit Plan . . . which cannot be resolved at the factory level may be referred, . . . to an Appeal Board. * * * The Appeal Board shall consist of six (6) members, two (2) each from the International Union and

> from Deere & Company, and one (1) each from the respective factory and Local Union. * * * If the Appeal Board is unable to resolve the dispute by majority vote of its members, then the Board shall adjourn pending the appointment of a seventh member, who at a subsequent meeting of the Board shall hear the positions of the Company and Union members and thereafter cast the deciding vote. This seventh member shall in all cases, absent agreement to the contrary, be the permanent arbitrator designated under the Labor Agreement between the parties. * * * All decisions of any Appeal Board concerning interpretation of the language of any provision of the Health Benefit Plan . . . shall thereafter govern the interpretation of the language of the Health Benefit Plan."

Obviously, the foregoing provisions do not purport to confer discretionary authority on the Plan Administrator to interpret the language of the Health Benefit Plan. While such authority may be vested in the Appeal Board, it is clear to us that the Appeal Board, unlike the Plan Administrator (Deere & Co.), is so constituted to more fairly represent the employees in employer/employee disputes and, as such, would be subject to an administrative review standard. There is no allegation that the Appeal Board procedure was pursued in this case; in fact, the Plan precludes an assignor's utilization of the Plan's appeal procedures. Further, defendant does not point to any other provision of the Plan that could be interpreted as granting discretionary authority to the Plan Administrator to interpret the Health Benefit Plan's language. Rather, defendant attempts to equate the Plan Administrator with the Appeal Board to escape the *de novo* standard of review.

In our opinion, the *de novo* standard of review is clearly required here. Although plaintiffs urged the circuit court to apply a "sole benefit" standard, giving less deference to the employer's decision for the reason that denial of claims would benefit the employer to the detriment of the employees (*see Ahne v. Allis Chalmers* (E.D. Wisc. 1986), 640 F.Supp. 912), the record establishes that the circuit court applied the "arbitrary and capricious" standard in approving the Plan Administrator's denial of plaintiffs' claims here.

Under the *de novo* standard, we find that plaintiffs' construction of the relevant provision should prevail. In reaching this conclusion we are mindful of the purpose for which ERISA was enacted – *i.e.*, " 'to promote the interests of employees and their beneficiaries in employee benefit plans,' *Shaw v. Delta Airlines Inc.*, 463 U.S. 85, 90, 103 S.Ct. 2890, 2896, 77 L.Ed.2d 490 (1983), and 'to protect contractually defined benefits,' *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 148, 105 S.Ct. 3092, 3093, 87 L.Ed.2d 96 (1985)." (*Firestone*, 109 S.Ct. at 955. We note that it is not at all uncommon in the offices of modern treating physicians to provide pharmaceutical and even surgical services on the premises. In effect, the dispenser of services in such case is the alter ego of the treating physician, and that practice is the functional equivalent of plaintiffs' in this case. Defendant's argument that its narrow, "two-physician" construction protects against over-utilization of physical therapy does not convince this court that the underlying purpose of the Health Benefit Plan and the legislation governing it is not better served by plaintiffs' broad reading of the provision at issue.

We have considered defendant's argument that plaintiffs are bound by the March 5, 1985 agreement between Deere and the UAW union, in which the employer and the union acknowledged that "the phrase 'other facilities such as rehabilitation centers having comprehensive physical therapy facilities' . . . has always meant and will continue to mean those facilities that have already been approved by the Company and does not include the offices of medical doctors, chiropractors, osteopathic physicians or the offices of other similar providers." It is our understanding that no treating physicians' offices have been approved by Deere because the Plan Administrator interpreted the language of the physical therapy provision to require one health provider to perform the therapy based on a prescription from a different physician. Because we hold that a proper interpretation of the language of the Health Benefit Plan provision in issue does not require that covered physical therapy treatments be restricted to those performed by physicians or therapists other than the prescribing physician, we find that the March 5, 1985 agreement is ineffective to preclude payment of plaintiffs' claims.

Whether, in fact, plaintiffs' offices are equipped as "comprehensive physical therapy facilities" remains a question that must be resolved on remand. We hold only that under the *de novo* review standard applicable to this case plaintiffs' claims may not be denied for the reason that physical therapy treatments were performed by plaintiffs in their own offices.

The judgment of the circuit court of Rock Island County is reversed.

Reversed; cause remanded.

WOMBACHER, PJ., and HEIPLE, J., concurring.

STATE OF ILLINOIS,)
APPELLATE COURT,) ss.
THIRD DISTRICT,)

As Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and keeper of the Records and Seal thereof, I do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in this office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 8th day of December in the year of our Lord one thousand nine hundred and eighty nine.

/s/ Roger H. Johnson
Clerk of The Appellate Court

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

June 1, 1990

Mr. Robert J. Noe
Bozeman, Neighbour, Patton & Noe
P. O. Box 659
Moline, IL 61265

No. 69895 – T.J. Kennedy, D.C., et al., etc., respondents, v. Deere & Company, petitioner. Leave to appeal, Appellate Court, Third District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 25, 1990.

IN THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT ROCK ISLAND COUNTY, ILLINOIS COUNTY DIVISION

T. J. KENNEDY, D.C.; TERRY L. BURKE, D.C. d/b/a BURKE CHIROPRACTIC CLINIC MICHAEL H. W. HURST d/b/a HURST CHIROPRACTIC CENTER; STEPHEN MINER, D.C. d/b/a MINER CHIROPRACTIC CLINIC; and JAMES P. WOODS, D.C.,	)	No. 83 L 230 (Consolidated)
Plaintiffs,	)	(Filed Mar 10, 1989)
vs.	)	
DEERE & COMPANY,	)	
Defendant.	)	

OPINION

The Plaintiff has filed a Motion for Summary Judgment. The defendant resists the Plaintiff's Motion.

The Defendant has also filed for partial summary judgment.

The health benefits plan involved says,

> "Out patient physical therapy benefits will be payable for services performed for a period of sixty treatment days *when prescribed by a physician* for a specified condition resulting from disease or injury or prescribed immediately following surgery related to the condition and when the physical therapy is *performed in a nursing home or other facilities such as rehabilitation centers having comprehensive physical therapy facilities*. Such services must be performed by a physician or a qualified physical therapist *according*

to the prescription from a physician concerning the nature, frequency and duration of the treatment."

The Plaintiff contends that under the Medical Practice Act of the State of Illinois the term "physician" means a person licensed under the Medical Practice Act to practice medicine in all its branches or a chiropractic physician.

The Plaintiffs' argument is straight forward. Plaintiff contends that the language of the plan cited above is clear and that extrinsic evidence cannot be used to controvert the unambiguous language of the plan.

At common law whether the language of a contract is ambiguous or unambiguous, is for the Court to determine. If the language is unambiguous then the Court does not resort to extrinsic evidence to determine the meaning of the language. On the other hand, where the language is ambiguous then the Court may resort to extrinsic evidence.

While the U.C.C. has no application whatsoever to this case, the rules set forth therein are typical of the common law rules.

Section 1-205 of the U.C.C. provides that the previous course of dealings and trade usages can be taken account of in construing an agreement, but that the express terms of the agreement prevail where it is unreasonable where the course of dealings and trade usages conflict with the express terms of the agreement.

Similarly, under Section 2-208 a course of performance can be taken into consideration to determine the meaning of ambiguous contract but that the express

terms govern where the language of the contract cannot reasonably be construed consistently with course of performance.

Quite separate and apart from these two prior rules of construction is the rule of modification set out by Section 20209. While previous conduct, trade usage, an course of performance are tools used to construe an ambiguous contract, modification is the creation of a new contract.

Mr. Noe, on behalf of the Defendants, in his Motion for Partial Summary Judgment and in his resistence to the Plaintiffs' Motion for Summary Judgment, asserts that Deere provides certain health and accident benefits pursuant to the John Deere Health Benefit Plan for *hourly and incentive paid employees* and that this is an employee benefit plan as defined by ERISA.

Mr. Noe further asserts that the plan resulted from collective bargaining between Deere and the UAW.

He further contends that Deere maintained in full force a second plan, the John Deere Health Benefit Plan for *salaried employees* and that Deere has applied to this second plan the same interpretations given to the terms of the first plan. Thus it is contended that there is one plan between Deere and its hourly employees which resulted from the collective bargaining process. And that there is a second plan on behalf of the salaried employees which has been given the same interpretations as the first plan.

Noe [sic] Noe also contends that Deere has at all times been the plan administrator. He further contends

that any claim that the plaintiff chiropractors have is dependent upon whether they have performed services in "rehabilitation centers having comprehensive physical therapy facilities" as that phrase has been interpreted under the plan and that these chiropractors, as assignees of the patients' rights, have no greater rights under the plan than the patients themselves would have had.

Mr. Noe further claims that since March 5, 9985 [sic] the prior understanding of Deere and UAW, being the sole parties to the collective bargaining agreements in force at all times relevant to this litigation, have been confirmed in writing and that these written understandings have subsequently been incorporated into the collective bargaining agreements, effective from February 2, 1987 and thereafter. In short, Mr. Noe contends that by virtue of the letter of March 5, 1985 which was not objected to by the UAW that Deere and UAW reached through the collective bargaining process an understanding as to what the disputed paragraph of the plan meant.

That that understanding specifically provided that,

> ""Other facilities such as rehabilitation centers having comprehensive physical therapy facilities" has always meant and will continue to mean those facilities that have *already* been approved by the company and does not include the offices of medical doctors, chiropractors or the offices of other similar providers."

Mr. Noe further contends that this case is controlled by the collective bargaining agreement and by ERISA and that common law principles are not applicable. The main thrust of his argument is this, "The interpretation which has been given the key phrase by both parties to the

collective bargaining agreement must control as a reasonable interpretation which is not arbitrary, capricious or in bad faith." In essence he is saying that once Deere and the UAW bargained-out the meaning of "other facilities such as rehabilitation centers having comprehensive physical therapy facilities" that that interpretation is a modification of any prior agreement and that as a matter of law since it doesn't violate any federal statute, it is reasonable, not arbitrary, not capricious and not in bad faith.

In Stewart v. National Shopman Pension Fund, 795 F.2d 1097 (D.C. Cir.1986) the Federal Court of Appeals indicated that judicial review of decisions of the trustee was strictly limited.

In Chicago District Council of Carpenters Pension Fund v. Exhibition Contractors Company, Inc., 618 F.Supp. 234, 238-39 (D.C.Ill. 1985) the Court said, "It is well settled that trustees of pension plans have full authority and broad discretion in dealing with questions involving benefit coverage. . . . " In Tomlin v. Board of Trustees of Construction Laborers, 586 F.2d 148 (9th Cir.1978). The Court indicated that courts take cognisance [sic] "of the pie" and there is no design on the part of the courts to second guess the judgment of the trustee.

Mr. Noe points out that in ERISA cases the courts have adopted an "arbitrary or capricious" standard under which review is narrow. Trustees are not reversed unless there is a clear error of judgment. Bauman Transportation, Inc. v. Arkansas Best-Freight Systems, Inc. 419 U.S. 281 (1974).

Mr. Noe also points out that in ERISA matters common law rules of construction are inappropriate and the claims must be considered in light of the principles of ERISA. Tinsley v. General Motors Corporation, 622 F.Supp. 1547 (D.C.Ind. 1985). Mr. Noe argues that from March of '85 onward the agreement of Deere and the UAW, being the parties to the collectively bargained agreement, have been confirmed in writing and he cites to the Court United Mine Workers of America Health & Retirement Funds v. Robinson, 455 U.S. 562. In Robinson the Supreme Court held that, "There is no general requirement that a complex schedule of various employee benefits must withstand judicial review under an undefined standard of reasonableness." This is no less true when the potential beneficiaries subject to the discriminatory treatment *are not members of the bargaining unit.*" The Supreme Court went on to say, "When neither the collective bargaining process nor its end product violates any command of Congress, a Federal Court has no authority to modify the substantive terms of a collective bargaining contract."

Mr. Van Hooreweghe, on the other hand, contends that it is the Defendant who seeks to engraft conditions and qualifications upon the (plain) language of the plan. Mr. Van Hooreweghe contends that nowhere does the plan limit the services in question to those provided by a physical therapist nor does the plan exclude the performance of those services in a doctor's office. He cites cases to the Court which in essense hold, "Where the trustees impose a standard not required by the pension plan itself, this Court has stated that such action would result in an

unwarranted and arbitrary construction of the plan." Maness v. Williams, 513 F.2d 1267.

Mr. Van Hooreweghe argues that to interpret (construe) the plan makes the word "physician" superfluous and that to eliminate a doctor's office as an appropriate facility engrafts conditions on the plan not contemplated by the language of the plan.

He further argues that where the employer is also the trustee that the applicable standard is not the "arbitrary and capricious standard" but rather the standards set forth in Struble v. N.J. Brewery Trustees Fund, 732 F.2d 325. The thrust of his argument is where the decisions that it makes in interpreting the plan can result in direct economic benefit to the employer the "arbitrary and capricious standard" is not applicable but rather the "sole benefit test" is applicable.

Mr. Noe, on the other hand, argues that the case of Ahne v. Allis-Chalmers Corp., 460 F.Supp. 912 (E.D.Wis. 1986), does not hold that the "sole benefit" test is the appropriate test as has been asserted by Mr. Van Hooreweghe.

In *Ahne*, the plaintiffs were former employees who had been terminated after their salaries had been reduced on several occasions. A dispute arose as to whether their termination benefits should be calculated based upon their reduced "base monthly salary rate" or the salary rate in effect prior to the reductions. The *Ahne* court analyzed the decision in *Struble* and said, "Struble involved an employer's decision as trustee of a trust fund subject to ERISA, to offset the trust fund's surplus against its obligation as employer to contribute a set amount to

the fund pursuant to the terms of the collective bargaining agreement. The Third Circuit held that such a decision benefited a third party, namely the employer, to the detriment of the trust fund's beneficiaries. Thus, the 'sole benefit' standard, rather than the 'arbitrary and capricious' standard, was appropriate. . . . In the present case, the Court finds the arbitrary and capricious standard appropriate."

Having considered the briefs and the arguments of the attorneys as regards the claims made after March 5th, 1985, the court believes that summary judgment should be granted to Deere and Company and against the Plaintiffs on Deere and Company's Motion for Summary Judgment, and against the Plaintiffs and for Deere on the Plaintiffs' Motion for Summary Judgment.

The court is mindful that just because both parties move for summary judgment that it does not mean one of the parties is entitled to summary judgment. Even though both sides seek summary judgment, the court must still be convinced that no genuine issue of material fact exists. The court is also aware that on a motion for summary judgment all reasonable inferences are drawn in favor of the Respondent to the motion and against the movant.

Nevertheless, the court makes the following findings:

1. The chiropractors have standing because they are assignees of their patients. They stand in the shoes of the persons they treated. If those patients have no claims under the contracts, then the chiropractors have no claims.

2. Whatever the meaning of the contested language was before March 5th, 1985, after March 5th, 1985, the meaning of the language is totally clear. In the letter of March 5, 1985, Deere set out its position, and the UAW registered no disapproval. Thereafter, the UAW and Deere entered collective bargaining agreements that defined "other facilities such as rehabilitation centers having comprehensive physical therapy facilities" so as to specifically exclude offices of medical doctors, chiropractors, and osteopathic physicians.

3. Whatever may have been the meaning before March 5th, 1985, Deere and the UAW under federal law had a right to bargain, and they had a right to modify or redefine any of the terms of the health plans.

4. The court specifically finds that the parties did bargain and that they reached collective bargaining agreements, which were adduced as Exhibits I and J.

5. The court finds that at this time there is no ambiguity as to whether chiropractors performing physical therapy services in their offices are covered. Clearly they are not.

6. That under ERISA, Deere is the trustee and plan administrator. As such, it has the primary responsibility of interpreting the plan.

7. That the administrator since March 5th, 1985, has clearly interpreted the plan in accordance with the collective bargaining agreement.

8. That as a matter of law, given the existence of the collective bargaining agreement, there is no genuine material issue of fact on the question of whether the plan

administrator's interpretation is arbitrary or capricious. Deere and the UAW; the sole bargaining representative of the hourly and incentive employees, had reached a collective bargaining agreement as to the meaning of the paragraph now in question. It was totally reasonable for the plan administrator to read the paragraph in accordance with the intent of the parties to the collective bargaining agreement.

9. That under the United States Supreme Court holding in *Robinson,* non-union employees can be bound by the results of the collective bargaining agreement.

10. That the administrator's construction of the plan affecting Salaried Employees is consistent with its construction of the plan covering Hourly and Incentive employees. As such it is not unreasonable or capricious. Indeed it seems to the court that to construe identical provisions under the two plans differently would be arbitrary and capricious.

11. The Court also believes that under ERISA principles, powers to interpret the provisions of the plan resides with the plan administrator and not the courts in the first instance, and that where the interpretation is a reasonable one, as a matter of law, the court may not second guess.

The court believes that the collective bargaining agreements made between the union and the company were modifications of the prior agreement meant to clarify the prior agreement, and that at this point in time there is no genuine material issue of material fact. Accordingly, as to any claims arising after March 5th, 1985, summary judgment is granted on Defendant's

Motion against Plaintiffs in favor of the Defendant, and summary judgment on Plaintiffs' Motion against the Defendant is denied.

As regards claims made under the two plans prior to March 5th, 1985, summary judgment will also be granted in favor of Deere and Company and against the Plaintiffs on Defendant's Motion for Summary Judgment, and summary judgment will be denied on Plaintiffs' Motion.

The provision of the plan in question provides:

> "A. Outpatient physical therapy benefits will be payable for services performed for a period of 60 treatment days when *prescribed* by a physician for a specified condition resulting from disease or injury or prescribed immediately following surgery related to the condition and when the physical therapy is performed in a nursing home or other facilities such as rehabilitation centers having comprehensive physical therapy facilities. Such services must be performed by a physician or a qualified physical therapist *according to prescription* from a physician concerning the nature; frequency and duration of treatment."

Mr. VanHoorewegh[illegible]e takes the position that pursuant to Illinois law a chiropractor is a physician, and that the chiropractor can prescribe that he himself shall perform physical therapy services in his own office.

Mr. Noe on the other hand, takes the position that the clear intent of the language is that one person has to do the prescribing and a second person has to do the performing.

The provision of the plan in question contains the word *"prescribed"*; additionally it contains the word *"prescription"*.

Mr. VanHooreweghe would read the plan to say "out patient physical therapy benefits will be payable when performed by a chiropractor upon his determination that such treatment is necessary."

The court does not believe that is a reasonable interpretation.

Mr. VanHooreweghe has relied on the fact that physician is defined by the statutes of the State of Illinois to include chiropractors. If he relies on that statutory provision, he must also rely upon the provisions of Chapter 56½ Sec. 1102-(nn) (which law became effective on October 1st, 1974, and which law has since been replaced by Illinois Revised Statute, Chapter 56½, Section 502.36).

The law on October 1, 1974 provided:

> "Prescription means a lawful written or verbal order of physician. . . . for any controlled substance."

In two places in the disputed paragraph it was required that the treatment be *"prescribed by a physician"* and *"according to the prescription from a physician"*. Under the statute a prescription is an order from a physician. I find that it is an order to somebody else. Given the double use of the term in the provision of the plan in question, I think the clear and unambiguous intent of the provision is that there would be a prescription from one

person to another. Accordingly, I do not feel it is necessary to resort to extrinsic evidence. However, the extrinsic evidence also shows that at all times the administrator construed the plan in this way.

The court is further mindful that these plans are ERISA plans and that construction of the plans is not for the court but for the administrator. I cannot say that the administrator's call was capricious or arbitrary. Rather I don't think there is any genuine material issue of fact but that his interpretation was both reasonable and non-arbitrary.

Accordingly, as to claims prior to March 5th, 1985, the Plaintiffs are denied summary judgment on their motion, and the Defendant is granted summary judgment against the Plaintiffs on its motion.

The same reasons can also be used to support summary judgment as to the post March 5, 1985 claims.

Mr. Noe is to prepare an appropriate order. The order to include findings pursuant to Supreme Court Rule 304 (a) applicable to partial summary judgments.

Dated: March 10, 1989.

/s/ John Donald O'Shea
Circuit Judge

IN THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT ROCK ISLAND COUNTY, ILLINOIS COUNTY DIVISION

T. J. KENNEDY, D.C., et al., Plaintiffs,	)	No. 83 L 230 (Consolidated)
vs.	)	MAR 16 1989
DEERE & COMPANY, Defendants.	)	

JUDGMENT ORDER

The above cause coming on for hearing on the Motion for Summary Judgment filed by the plaintiffs and the Motion for Partial Summary Judgment filed by the defendant, and the Court having considered said motions and supporting material filed by both parties, together with arguments of counsel and being fully advised,

It is hereby ORDERED as follows:

1. The Motion for Summary Judgment filed by the plaintiffs is denied.

2. The Motion for Partial Summary Judgment filed by the defendant is allowed.

3. Judgment is entered in favor of the defendant and against the plaintiffs as to all claims herein for alleged "outpatient physical therapy" benefits.

4. There is no reason to delay enforcement or appeal of this Order.

Entered this 16 day of March, 1989.

/s/ John Donald O'Shea
JUDGE

ARTICLE XVI

OUTPATIENT PHYSICAL THERAPY BENEFITS EMPLOYEES AND DEPENDENTS

Section 1. Other Than a Hospital

A. Outpatient physical therapy benefits will be payable for services performed for a period of 60 treatment days when **prescribed by a physician** for a specified condition resulting from disease or injury or prescribed immediately following surgery related to the condition and when the physical therapy is performed in a nursing home or other facilities such as rehabilitation centers having comprehensive physical therapy facilities. Such services must be performed by a physician or a qualified physical therapist according to prescription from a physician concerning the nature, frequency and duration of treatment.

B. Consultation services of a physician who is a specialist in rehabilitation or physical medicine when requested by the physician in charge of the case where special skill or knowledge for proper diagnosis and treatment is required, will be provided once during or preceding a course of physical therapy treatment whether charged by the physician or charged by the institution where the service is rendered.

ARTICLE VII

APPEAL BOARD PROCEDURE

APPLICABLE TO APPENDICES "B," "C," "I," "J," "J-1," "K," "L" AND "L-1"

Section 1. Purpose

A. An Appeal Board shall be established for the purpose of resolving disputes concerning the interpretation of the provisions of the Health Benefit Plan as set forth in Appendix "B", the Disability Benefit Plan as set forth in Appendix "C," the Group Life and Disability

Insurance Plan as set forth in Appendix "I", the profit sharing plan as set forth in Appendices "J" and "J-1," the Employee Stock Ownership Plan as set forth in Appendix "K", and the John Deere Tax Deferred Savings Plan as set forth in Appendices "L" and "L-1."

B. It is not the intent that this Appeal Board procedure shall in any way change or deal with the question of the procedure for handling individual employee insurance claims. It is, however, the intent of this procedure to establish a means of determining questions or disagreements and to resolve disputes over the proper interpretation of the provisions of the Health Benefit Plan as set out in Appendix "B," the Disability Benefit Plan as set forth in Appendix "C," the Group Life and Disability Insurance Plan as set forth in Appendix "I," the Profit Sharing Plan as set forth in Appendices "J" and "J-1," the Employee Stock Ownership Plan as set forth in Appendix "K," and the John Deere Tax Deferred Savings Plan as set forth in Appendices "L" and "L-1."

Section 2. Procedure

A. Any dispute concerning the interpretation of the language in the aforementioned Health Benefit Plan, Group Life and Disability Insurance Plan, Disability Benefit Plan, Profit Sharing Plan, Employee Stock Ownership Plan, or the John Deere Tax Deferred Savings Plan which cannot be resolved at the factory level may be referred, by notice in writing from the International Union to the Industrial Relations Department of Deere & Company, to an Appeal Board. The referral must be not later than thirty (30) days after the Manager of Industrial Relations has given the factory's final position. The Manager of Industrial Relations will give the factory's final position within thirty (30) calender days after the Local Union has submitted the dispute in writing. This procedure shall be in place of the review procedure provided in the Health Benefit Plan, Appendix "B,"

Article I, Section 11-B, the Disability Benefit Plan, Appendix "C", Article I, Section 11-B, the Group Life and Disability Insurance Plan, Appendix "I", Article I, Section 8-B, the General Provisions of the Profit Sharing Plan, Appendix "J," Section 6, Step 2-B and the Employee Stock Ownership Plan, Appendix "K," Article VII, Section 8, and the John Deere Tax Deferred Savings Plan, Appendix "L," Section 5, Step 2-B.

B. The Appeal Board shall consist of six (6) members, two (2) each from the International Union and from Deere & Company, and one (1) each from the respective factory and Local Union. The Company and the Union shall appoint and remove its own members from the Appeal Board at will subject only to notification to the other party.

C. If the Appeal Board is unable to resolve the dispute by majority vote of its members, then the Board shall adjourn pending the appointment of a seventh member, who at a subsequent meeting of the Board shall hear the positions of the Company and Union members and thereafter cast the deciding vote. This seventh member shall in all cases, absent agreement to the contrary, be the permanent arbitrator designated under the Labor Agreement between the parties.

D. All rules and procedures concerning the calling of meetings of the Appeal Board, the proceedings before the Appeal Board and the conduct of the Appeal Board when it sits with its seventh member shall be determined by the Appeal Board.

E. The seventh member of the Board, when his presence and participation are necessary, shall act as Chairman of the Board; and in considering the issue involved and in casting his vote shall be bound by the specific provision or provisions of the Health Benefit Plan, Group Life and Disability Insurance Plan, Disability Benefit Plan, Profit Sharing Plan, Employee Stock Ownership Plan or the John Deere Tax Deferred Savings Plan as identified above; and

he shall have no power to add to, subtract from or modify the language thereof, but shall be bound thereby. All decisions of any Appeal Board concerning interpretation of the language of any provision of the Health Benefit Plan, Group Life and Disability Insurance Plan, Disability Benefit Plan, Profit Sharing Plan, Employee Stock Ownership Plan, or the John Deere Tax Deferred Savings Plan shall thereafter govern the interpretation of the language of the Health Benefit Plan, Group Life and Disability Insurance Plan, Disability Benefit Plan, Profit Sharing Plan and Employee Stock Ownership Plan, and the John Deere Tax Deferred Savings Plan.

The above Appeal Board Provisions are a continuation of the Appeal Board Procedures in existence since the first claim of the plaintiffs. See Affidavit of Craig A. Kress, Manager, Employee Benefit Plans Services, Deere & Company. (R.C858-859)

DEERE & COMPANY

John Deere Road, Moline, Illinois 61265 U.S.A.

Industrial Relations Department

5 March 1985

Mr. James E. Hecker
International Union, UAW
3610 – 25th Street
Moline, Illinois 61265

Dear Jim:

The subject of outpatient physical therapy benefits (Appendix "B", Article XVI) has been discussed previously and again in recent discussions between the parties.

The parties agreed that the phrase "other facilities such as rehabilitation centers having comprehensive physical therapy facilities" (Appendix "B", Article XVI, Section a-A) has always meant and will continue to mean those facilities that have already been approved by the Company and does not include the offices of medical doctors, chiropractors, osteopathic physicians or the offices of other similar providers. A list of current approved facilities in our major manufacturing areas is attached for your records.

In the future, if additional facilities are approved by the Company, the Union will be so notified and will have the right to disapprove such facility(ies) as a provider of benefits under Appendix "B", Article XVI.

If you have any questions, please contact me.

Sincerely,

C.A. Kress, Manager
Employee Benefit Plans Services

(2)

No. 90-381

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DEERE & COMPANY,
Petitioner,

vs.

T. J. KENNEDY, *et al.*,
Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI FROM THE ILLINOIS APPELLATE COURT

FRANCIS VAN HOOREWEGHE
(Counsel of Record)
VAN HOOREWEGHE, FACKEL & THULINE
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(309) 762-0736

Attorneys for Respondents

St. Louis Law Printing Co., Inc., 13307 Manchester Road 63131 314-231-4477

QUESTIONS PRESENTED FOR REVIEW

1. Contrary to the representation of the Petitioner, one of the issues presented for review is: Was the Appellate Court of Illinois correct in applying the de novo standard of review to the health plan in question when the specifically named fiduciary - administrator is given no discretion to interpret the terms of the plan?

2. Is the decision of the Illinois Appellate Court final under 28 U.S.C. 1257(3)?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings were the Petitioner, Deere & Company, and the Respondents, T. J. Kennedy, D.C.; Terry L. Burke d/b/a Burke Chiropractic Clinic; Michael H. W. Hurst d/b/a Hurst Chiropractic Center; Stephen Miner, D.C. d/b/a Miner Chiropractic Clinic; and James P. Woods, D.C. In the trial court, the suit of Harlow E. Wells, D.C. had been consolidated with the suits of the other respondents named above, but Wells voluntarily dismissed his suit against the Petitioner on November 16, 1984.

The subsidiaries of Deere & Company as listed by the Petitioner, while impressive, are not parties to this action.

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TABLE OF AUTHORITIES

No. 90-381

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DEERE & COMPANY,
Petitioner,

VS.

T. J. KENNEDY, *et al.*,
Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI FROM THE ILLINOIS APPELLATE COURT

OPINIONS BELOW

Respondents agree to the Opinions Below as submitted by the Petitioner herein.

JURISDICTION

Respondents do not believe jurisdiction is present under 28 U.S.C. 1257(3).

STATEMENT OF THE CASE

It is necessary to make the following corrections to Petitioner's statement of the case.

On page 4, Petitioner states: "The plan administrator has the right to interpret language of the plan . . .".

The only body with authority to interpret the language is the Appeal Board.

Article 1, Section 7 of Appendix "B" states:

> "Section 7. Named Fidiciary and Plan Administrator. Deere & Company is the Named Fiduciary and the Plan Administrator and shall administer this Plan, except as otherwise specifically provided."

Article 1, Section 8 of Appendix "B" states:

> "Section 8. Amendment, Modification, and Termination. Except as otherwise specifically provided, Deere & Company may at any time amend, modify, or terminate the Plan, provided however, that no change shall reduce the amount of any benefit to which an employee, retired employee, or beneficiary shall be entitled in respect to claims incurred prior to the effective date of such change."

Article IV of Section 1, Appendix "1" A. states in part:

> "During the term of this Collective Bargaining Agreement, the Company (Defendant) shall not exercise its option under . . . (2) *Section 8* of Article 1 of the Health Benefit Plan for Hourly and Incentive Pain Employees . . . and neither party shall have the right to request changes in or additions to these Plans."

So, Defendant has waived its ability to amend or alter the plan.

Then, as Defendant acknowledges, an appeal board is established to make *binding determinations* "concerning the interpretation of the language in the aforementioned Health Benefit Plan . . ."

That appeal board consists of: "six members, two each from the international union and from Deere & Company, and one each from the respective factor and Local Union."

It also includes, when necessary, a seventh member who shall be "the permanent arbitrator designated under the Labor Agreement between the parties."

The decisions of that board "shall thereafter govern the interpretation of the language of the Health Benefit Plan." Thus, Defendant exercises *no* discretion in interpreting the language of the plan.

REASONS FOR DENYING THE WRIT

I. THE PLAN IN QUESTION GRANTS NO DISCRETION TO THE ADMINISTRATOR-FIDUCIARY. APPLYING THE PRINCIPLES OF *FIRESTONE TIRE AND RUBBER COMPANY v. BRUCH*, 489 U.S. ____, 103 S.Ct. 948, 103 L.Ed.2d 80, DE NOVO REVIEW WAS PROPER. THE RESULTING MANDATE ENFORCING THE PLAN AS WRITTEN IS NOT OF SUFFICIENT IMPORT TO DEMAND THE ATTENTION OF THIS COURT.

A. This is, and always has been, a simple case of contract construction. It is, and always has been, a request by a small group of physicians to have the Deere & Company health benefit plan enforced as written.

This is Petitioner's second attempt to involve this court in a very limited dispute. The prior unsuccessful effort was based on Petitioner's contention that the Plaintiffs, having taken assignments of benefits, had no standing to sue under E.R.I.S.A. That issue would have had more far-reaching effects than the present dispute and you correctly declined review.

Now consistent with the stated purposes of E.R.I.S.A. to diligently protect the rights of parties covered by health benefit plans; and the standards of de novo review allowed by *Firestone Tire and Rubber Company v. Bruch*, 489 U.S. ____, 103 S.Ct. 948, 103 L.Ed.2d 80, the appellate decision enforces the plan as written.

No issues of national import engraft themselves onto this limited dispute.

B. Petitioner alleges that the court rewrote the agreement between the parties.

Contrary to this allegation what the Court found was:

1. That Deere & Company was the sole administrator -fiduciary under the plan.

The Plan states:

> "Section 7. Name Fiduciary and Plan Administrator. Deere & Company is the Named Fiduciary and the Plan Administrator and shall administer this Plan, except as otherwise specifically provided."

Under *Firestone* if the administrator-fiduciary has no discretion to interpret the plan a de novo standard of review is proper.

The Plan says:

> "Section 8. Amendment, Modification, and Termination. Except as otherise specifically provided, Deere & Company may at any time amend, modify, or terminate the Plan, provided however, that no change shall reduce the amount of any benefit to which an employee, retired employee, or beneficiary shall be entitled in respect to claims incurred prior to the effective date of such change."

Article IV of Section 1, Appendix "1" A. states in part:

> "During the term of this Collective Bargaining Agreement, the Company (Defendant) shall not exercise its option under . . . (2) *Section 8* of Article 1 of the Health Benefit Plan for Hourly and Incentive Pain Employees . . . and neither party shall have the right to request changes in or additions to these Plans."

Thus, since no discretion is granted to Deere the court's de novo review was correct.

3. The Plan as written, does not mandate the involvement of two health care professionals.

Again, the Plan states:

> "Out patient physical therapy benefits will be payable for services performed for a period of 60 treatment days when prescribed by a physician for a specified condition

> resulting from disease or injury or prescribed immediately following surgery related to the condition and when the physical therapy is performed in a nursing home or other facilities such as rehabilitation centers having comprehensive physical therapy facilities. Such services must be performed by a physician or a qualified physical therapist according to prescription from a physician concerning the nature, frequency and duration of the treatment."

This language does not require one physician to prescribe to another.

The purpose of the language "such services must be performed by a physician (or a qualified physical therapist according to a prescription from a physician concerning the nature, frequency, and duration of treatment.)" *() added*; is to comply with the law.

Physical therapists as a profession may not *prescribe* treatment--they may only *provide* treatment "according to a prescription from a physician . . ." Thus the decision enforces the Plan as written.

One can see therefore that no major clarification of *Firestone* is necessary. The decision is entirely consistent with the holdings of that case.

The decision is also consistent with the holding in *Boyd v. Trustees of the United Mine Workers Health & Retirement Funds*, 873 F.2d 57 (4th Cir. 1989) at p. 59. Deferential review was granted in *Boyd* specifically because the Trustees had discretion. The alleged conflict with *Boyd* is non-existent. Petitioner cannot point to one provision giving Deere & Company, the fiduciary-administrator, discretion similar to that given the Trustees in *Boyd* . As a result, pursuant to your previous decision, a different standard of review is applicable.

C. The law of labor-management is unaffected by this decision. The parties to the plan negotiated the terms of one plan in regard to the powers of the fiduciary-administrator.

The U.A.W. apparently sought and Deere & Company was apparently satisfied to accept a plan where the fiduciary-administrator had no discretion. That being true, Defendant allowed the de novo review applied herein.

Interestingly, that review did not change the terms of the agreement, but merely applied it as written.

D. One must also remember that only one of the *two* identical plans is collectively bargained. One plan covers the hourly and incentive paid workers--this one was negotiated. The other, for salaried workers, was not negotiated. Are we to apply a different standard to the two? Certainly not.

We urge you to recall that this suit is founded in E.R.I.S.A. whose lofty purpose is to protect those covered by such plans from abuse and inconsistent application.

The decision of the Appellate Court below protects those covered by the plans, and protects best against inconsistent application of identical plan provisions.

The entire fabric of labor-management relations will not be rent if this Court refuses to review this limited decision.

II. REVIEW MAY NOT BE WARRANTED DUE TO LACK OF FINALITY.

Petitioner alleges that this Court has jurisdiction under 28 U.S.C. 1257(3) as interpreted and discussed in the first two categories classified in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 569, 43 L.Ed.2d 328, 95 S.Ct. 1029 (1974).

The language of 1257(3) speaks in terms of "final" decisions. It is clear from the decision of the Appellate Court that this dispute is far from resolved since the matter was remanded for further proceedings.

Thus unless the exceptions to ultimate finality carved out by the Court in *Cox* aid the Petitioner, the appeal should be declined.

A. The first exception is:

"In the first category are those cases in which there are further proceedings, even entire trials - yet to occur in the state courts but where for one reason or another the federal issue controls." *Cox* at 43 L.Ed. 2d 328, 340.

The ultimate determination of the remaining issue - what constitutes a "comprehensive physical therapy facility" and the reasonableness of the charges - may result in a decision that eliminates the need of further consideration of the alleged federal issue raised here.

As stated by this Court there should be "very few circumstances" where a review of state court decisions should be had in this court when something remains to be determined by the state court. *Radio Station WOW Inc. v. Johnson*, 326 U.S. 120, 89 L.Ed.2d 2092, 65 S.Ct. 1475 (1945). This is doubly true where the review is sought on a narrow issue of construction of contract language affecting only the parties involved; resulting in no national, or even statewide impact.

Principles of judicial economy are not served if you agree to review this matter.

B. The second exception has been stated as:

"Cases . . . in which the federal issue, *finally decided* by the highest court in the state, will survive and require decision regardless of the outcome of further state proceedings." *Cox* at 43 L.Ed. 2d 328, 340.

This premise is alleged by Petitioner, but they fail to illustrate how that purported issue, if it truly exists, will survive. As is shown above, this cause could well be decided on the basis of other unrelated remaining issues.

The language found in the Deere & Company health benefit plans is clearly subject to the provisions of E.R.I.S.A., and the body of case law developed around that comprehensive statute. The federal "issue" of a conflict with the law of labor-management relations is a true red herring.

Petitioner cannot truly believe that all the provisions of E.R.I.S.A. and the multitude of cases decided under it - all designed to protect the benefits given to the employee may be avoided by reference to the Labor Management Relations Act.

Obviously the cases cited by Petitioner deal with labor matters outside the purview of E.R.I.S.A. Once a health benefit plan is adopted however the broad scope of that protective act asserts itself, and all parties touched by the Plan are controlled by it.

Petitioner has for all the years of this suit trumpeted that E.R.I.S.A. controls. Now when faced with an undesirable decision under E.R.I.S.A. they seek solace in another body of law which they feel will treat them more favorably. We pray that you will not be encouraged to erode the protection provided in E.R.I.S.A., and the *Firestone* decision by this ruse.

This Petitioner has been successful in effecting piecemeal determination of the issues in this cause since 1983. It is now time to call a halt to the effort to litigate every issue in this cause separately.

III. THE CASES OF *LANDRO V. GLENDENNING MOTORWAYS, INC.*, 625 F.2D 1344 (8th CIR. 1980) AND *IN RE WHITE FARM EQUIPMENT CO.*, 788 F.2D 1186 (6th CIR. 1986) ARE NOT CASES INVOLVING COLLECTIVELY BARGAINED AGREEMENTS.

The cases of *Landro v. Glendenning Motorways, Inc.* and *In Re White Farm Equipment Co.* do not stand for the proposition cited.

Neither case deals with a collectively bargained plan.

IV. NO BASIS FOR REVIEW UNDER SUPREME COURT RULE 10 EXISTS.

The decision of the court below is not in conflict with any other state or federal court decision.

The alleged conflict with *Boyd* decision has already been addressed.

No unsettled question of federal law remains for this court to determine; and the lower decision does not conflict with any applicable decision of this court.

The relevant law is found in *Firestone*, and the lower court zealously followed the guidelines set out therein to enforce the plans as written. We respectfully request that the petition be denied.

V. CONCLUSION

Petitioner struggles to elevate this dispute to a level that would make it worthy of your consideration.

Even if jurisdiction could be found the matter is no more than a simple case of contract construction.

More serious and broad-reaching situations clamor for your attention.

We respectfully pray that this petition be denied.

Respectfully submitted,

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